

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
IN SEATTLE

UNITED STATES OF AMERICA, et al., )  
  )  
  Plaintiffs, ) No. C70-9213RSM  
  ) Subproceeding 11-2  
v.                                      )  
  )  
STATE OF WASHINGTON, et al., )  
  )  
  Defendants. )  
  )

**MOTION HEARING**

BEFORE THE HONORABLE RICARDO S. MARTINEZ

September, 27, 2012

## APPEARANCES:

S 'KALLAMS: Lauren Rasmussen

LUMMI NATION: Mary Neil  
Daniel Raas  
Harry J. Johnsen

LOWER ELWHA KLALLAM TRIBE: Trent Crable  
Stephen H. Saugee

1                   THE CLERK: This is the scheduled oral argument on  
2 the petitioner's motion for summary judgment, Docket  
3 Number 40, cause number C70-9213, subproceeding 11-2, in  
4 regards to the Lower Elwha Klallam Indian Tribe, et al.  
5 versus the Lummi Nation. Would counsel rise and make  
6 their appearances for the court?

7                   MS. RASMUSSEN: If it please the court, my name is  
8 Lauren Rasmussen for the Port Gamble S'Klallam and  
9 Jamestown S'Klallam Tribes.

10                  THE COURT: Ms. Rasmussen.

11                  MR. CRABLE: May it please the court, my name is  
12 Trent Crable, for the Lower Elwha Klallam Tribe.

13                  THE COURT: Mr. Crable, I understand you and  
14 Ms. Rasmussen will be splitting the argument?

15                  MR. CRABLE: That's correct.

16                  MR. SAUGEE: Good morning, your Honor. Steve  
17 Saugee for Lower Elwha Klallam.

18                  THE COURT: Good morning.

19                  MS. NEIL: Good morning, your Honor. Mary Neil  
20 for the Lummi Nation.

21                  THE COURT: Ms. Neil.

22                  MR. RAAS: Good morning, your Honor. Daniel Raas  
23 for the Lummi Nation.

24                  THE COURT: Mr. Raas, nice to see you. How are  
25 you doing?

1                   MR. RAAS: I'm doing well. Thank you.

2                   THE COURT: Good. Counsel, our typical time that  
3 we offer for oral argument on these is 30 minutes, but in  
4 view of the fact that I think counsel have requested a  
5 little bit longer time, we will go ahead and give you an  
6 extra ten minutes a side, if necessary.

7                   As is my usual practice, I have looked at all the  
8 materials you have submitted, read all of the  
9 declarations, even went back and looked at some of the  
10 older cases as well. There are motions to strike by the  
11 Lummi here at the very beginning. Let me address two of  
12 them.

13                  The U.S.G.S. evidence in the 1989 declaration of  
14 Barbara Lane, that was in effect ruled out by the line of  
15 Muckleshoot cases, the court will grant the motions to  
16 strike, will not consider that evidence specifically.

17                  As to the other items, for purposes of this argument,  
18 the court will deny the motions to strike. I may very  
19 well look at it differently once I start trying to put the  
20 order together. But for purposes of the argument,  
21 everything else is in play.

22                  Who is going to start?

23                  Ms. Rasmussen, one of the things I need to have you  
24 address as we go through this, is tell me exactly what  
25 areas are at issue. I have looked at many of the

1 different maps. I am a little bit confused. I understand  
2 that the catchment areas, the numbers that are designated  
3 now are different than what they were of course way back  
4 before Judge Boldt. But I am a little confused as to  
5 exactly what areas are at issue.

6 MS. RASMUSSEN: Good morning, your Honor. Before  
7 I start with what my clients like to call the legal part  
8 of the argument, I am going to tell you the background of  
9 some of the U&A cases in this subproceeding and the other  
10 sub-proceedings.

11 Back in the old days, a Suquamish fisherman told me,  
12 "We fished where Dr. Lane said that we had our homes, and  
13 in front of those homes. Back in the old days we  
14 respected what Dr. Lane had said, because she knew about  
15 where we had been at treaty time sometimes better than we  
16 had." And then, he likes to say: "Ha, ha, ha, we  
17 lawyered up. And after that point we started to get savvy  
18 about the language that was used, and how it could be  
19 turned and twisted to expand different U&As in a way at  
20 the very beginning was never done. At the very beginning  
21 there was honor in what your Lane report said, and there  
22 was honor in how and where you fished."

23 This area, under the Lane report, for the Klallams,  
24 was covered all along the coastline with Klallam villages  
25 on the Strait of Juan de Fuca. They had village sites on

1 the west coast of Whidbey Island. There was specific  
2 findings in the Lane declaration they used these areas  
3 frequently and continuously for the purposes of fishing.

4 Now, the Lane declaration, with respect to the Lummi,  
5 has one phrase that speaks of fishing from the straits and  
6 bays from the northern -- the Fraser River to the present  
7 environs of Seattle.

8 Now, Mr. Crable will focus in more detail, but the  
9 district court found that although that path was spoken  
10 of, when you looked underneath the surface, there was no  
11 evidence of treaty time homes or villages along those  
12 routes.

13 And so the district court had said, twice, that this  
14 was not an area that showed the more than frequent -- more  
15 than for the purposes of travel kind of place.

16 THE COURT: Counsel, let me ask you to do one  
17 thing for me. Can you differentiate between Judge  
18 Rothstein and Judge Coyle?

19 MS. RASMUSSEN: I will do that. Both district  
20 courts agreed with each other on this area, Judge  
21 Rothstein and Judge Coyle.

22 We are here today because we think that this area that  
23 they have claimed, and they have issued -- the Lummi have  
24 issued, fishing regulations is inside the Strait of  
25 Juan de Fuca. And we believe the Ninth Circuit order at

1 235 F.3d says that the Lummi may not fish in the Strait of  
2 Juan de Fuca. And we believe it is wrong.

3 And we believe it is wrong because, if you wish -- if  
4 you do something, and you are sued for fishing in specific  
5 fishing areas, and regulations are cited, saying, this was  
6 the action that was not in conformity with the first  
7 decision, this is the stuff that we don't want you to do,  
8 and you lose once in front of Judge Coyle, and you lose  
9 once in front of Judge Rothstein, and you get to the Ninth  
10 Circuit and you make the same argument, and Judge Beezer,  
11 who authored the opinion says, you also cannot fish in the  
12 Strait of Juan de Fuca, and he uses the same exact  
13 geographic terminology that Lummi uses, and he denies  
14 their request, we don't believe it is credible that you  
15 can tell this court you didn't understand the geographical  
16 boundaries of what you asked for.

17 Yes, it is possible that every district court and all  
18 three Ninth Circuit judges were completely upside down  
19 with respect to the geography of this area. It is  
20 possible. But when we look at the record, it is very  
21 unlikely.

22 So this court asked us -- When we filed a motion to  
23 show cause, asking to hold Lummi in contempt for fishing  
24 in this area, this court said we want you to show -- I  
25 want you to show me the record. I want you to show me

1 where Lummi described these areas. I want to know the  
2 questions that were presented to the court. And I'm going  
3 to do that today.

4 First, I'm going to start -- First, I'm going to tell  
5 you the components of the order that we are dealing with  
6 today. I know this court is familiar with it. But the  
7 ruling starts with the conclusion that Admiralty Inlet is  
8 in and the Strait of Juan de Fuca and Hood Canal is out.  
9 That is on the first page of the order.

10 Then the court goes on to explain its reasoning with  
11 respect to the Strait of Juan de Fuca. It says I find the  
12 strait is to the west of the sound. This court was  
13 concerned about that. It said wait a minute, if the  
14 strait is to the west of the sound, could it be that there  
15 is some unnamed body of water that the court was talking  
16 about?

17 But if you look at this map, your Honor -- May I  
18 approach? You can see that the only correct explanation  
19 is that the strait is to the west of the sound. It can't  
20 be north of the sound. North would have been incorrect.  
21 East would have been incorrect. South would have been  
22 incorrect. In subproceeding 89-2, Admiralty Inlet was  
23 found to be part of the Puget Sound. In subproceeding  
24 05-3, Saratoga Passage was found to be part of Puget  
25 Sound.

1       Under any explanation, other than a cartographer who  
2       would have a specific amount of degrees that is west of  
3       the sound, this is a correct layman's explanation. And  
4       you see this explanation repeatedly over and over again in  
5       even the fishermen's declarations from the original Boldt  
6       testimony, where the fishermen said we went there, up into  
7       the Strait of Juan de Fuca, from the San Juan Islands up  
8       east into the Strait of Juan de Fuca. Everybody sort of  
9       describes it generally.

10      To clarify, and it is a little bit of a side note, but  
11     this court was concerned that the strait to the west of  
12     the Sound caused a problem. I don't think that it does.

13      And then the court says, how do you intend to include  
14     the Strait of Juan de Fuca? He would have used that  
15     specific term, as he did in other areas. And one of those  
16     other areas is the Klallam U&A determination. It  
17     specifically says the Strait of Juan de Fuca.

18      The court goes on to deny Hood Canal.

19      And then the court struggles a bit with respect to  
20     Admiralty Inlet. This is the ball of wax. This is why we  
21     are here today. The court says, "Geographically,  
22     Admiralty Inlet was intended to be included." Okay. And  
23     then he says -- Judge Beezer says, "It is also just as  
24     likely it was intended to be excluded as it was not."

25      And then it says, "Admiralty Inlet consists of the

1       waters west of Whidbey Island, separating that island from  
2       the Olympic Peninsula." Now, if we were confused as to  
3       what the court was saying, the court clearly has  
4       denominated the geographical boundaries of the areas here.  
5       Okay? They are saying it is the area separating the  
6       island from the Olympic Peninsula. That is where  
7       everybody knows Admiralty Inlet is. Mr. Hillaire in his  
8       declaration also says that's where Admiralty Inlet is, at  
9       the Point Wilson line.

10      So this is the ball of wax. If one starts at the  
11     mouth of the Fraser River and travels past Orcas and  
12     San Juan Islands, it is natural to proceed through the  
13     Admiralty Inlet to reach the environs of Seattle. Well,  
14     there is a problem, right? They don't connect.

15      This court says, well, don't I need to connect them?  
16      The question we have today is, is it okay for this court  
17     to fill in the blanks where that court specifically said  
18     Admiralty Inlet ends here? Admiralty Inlet ends here.

19      And so the one portion of the decision that Lummi is  
20     relying on is internally inconsistent, in that it speaks  
21     of a passageway, and then it contradicts itself by saying  
22     that Admiralty Inlet ends here. So both of those things  
23     can't be true.

24      But even more so, in the hierarchy of interpreting  
25     judicial opinions, is it reasonable to take the

1 explanation for Admiralty Inlet and bootstrap it to the  
2 Strait of Juan de Fuca, and grant yourself 311 square  
3 miles that were not granted by the decision? Is that an  
4 okay thing to do? Or are you bound by the same  
5 considerations a judge would be bound by? You can't alter  
6 or amend or enlarge upon the decision. You are not  
7 allowed to fill in the blanks.

8 The decision -- I hate to say this. The decision was  
9 not ideally written. It doesn't make sense. But if the  
10 court was confused, it was Lummi who confused them.

11 So I am going to turn to the statements in the Ninth  
12 Circuit brief, where I am going to tell you that seven  
13 times in their opening brief the Lummi has asked for the  
14 right to pass from Admiralty Inlet to Haro Strait.

15 THE COURT: Counsel, let me ask you a question  
16 before you get into that. I am trying to still frame  
17 exactly what it is that I am supposed to do. You just  
18 indicated that you don't believe that the Ninth Circuit  
19 opinion is ideally written, that maybe it doesn't make  
20 sense. Are you asking me to find what those other judges  
21 meant by the Strait of Juan de Fuca, the eastern end? Is  
22 that what I am being asked to do?

23 MS. RASMUSSEN: I am saying there is absolutely no  
24 question as to what the definition was in this case of the  
25 eastern Strait of Juan de Fuca. You don't need to find

1 that. Lummi has said seven times in their opening brief,  
2 and again in their closing brief, where the eastern Strait  
3 of Juan de Fuca is located. The Ninth Circuit necessarily  
4 answered the question that was presented to it. And it  
5 denied their full passageway.

6 If this is a harsh result, think of the harsh result  
7 that they had in front of the district court. The  
8 district court said we don't care if you had a path from  
9 the Fraser River to the environs of Seattle, we are going  
10 to give you no components of that path.

11 THE COURT: The district court didn't give them  
12 Admiralty Inlet --

13 MS. RASMUSSEN: The district court gave them  
14 nothing, despite the language that still says from the  
15 Fraser River to the present environs of Seattle.

16 The district court said, just like you did in 05-3,  
17 when I look at the evidence, I found your claim was naked,  
18 there wasn't anything behind it.

19 You know, there is a lot of strange U&A determinations  
20 out there. The Klallam themselves have a line that goes  
21 all the way across from Edmonds that of course didn't  
22 exist at treaty times. This is just the way this case is.  
23 But as a legal procedure, the court understood the  
24 question that was presented it.

25 Can I guess what the court did? Well, the court split

1 the baby. But did the court say that's what it was doing?  
2 No. The court is not going to say when it sort of says I  
3 am going to give you both something, and go home with your  
4 lumps and be happy.

5 The first reference in the Ninth Circuit decision --  
6 in the Ninth Circuit brief, the Lummi says, "Specifically  
7 based on the record before him, did Judge Boldt intend to  
8 exclude from the broad language of his ruling the marine  
9 waters of Admiralty Inlet and the open marine waters in  
10 the Strait of Juan de Fuca between Admiralty Inlet and  
11 Haro Strait on the western edge of the San Juan Islands?"

12 That is the question. They are saying the marine  
13 waters are between Admiralty Inlet and Haro Strait. The  
14 court has been told that once, the court is going to be  
15 told that again.

16 This is what Lummi is looking for: "This finding  
17 plainly includes all the marine areas between the Fraser  
18 River in the north and the vicinity of Seattle in the  
19 south. The waters at issue, Admiralty Inlet and the  
20 eastern portion of Strait of Juan de Fuca, are  
21 unquestionably located between these end points."

22 Here they recognize, "There may be some ambiguity  
23 about the western limits of the eastern portion of the  
24 Strait of Juan de Fuca." But the district court did not  
25 rule on this because it held Lummi had no rights whatever

1 in the strait.

2 This portion is important. This is what I was trying  
3 to tell the court in the motion for reconsideration. You  
4 didn't have to have a western boundary when you didn't  
5 have the Strait of Juan de Fuca, because that necessarily  
6 determines the issue.

7 This is Lummi's recognition of that: They go on to  
8 say, "The best resolution is to follow the literal wording  
9 and draw the line south from the mouth of the Fraser River  
10 to the southern shore of the strait on the Olympic  
11 Peninsula, and then proceed to Seattle."

12 Reference Number 3. "If one begins at the mouth of  
13 the Fraser and follows Dr. Lane's description through the  
14 straits and bays, south to the present environs of  
15 Seattle, one passes through Georgia Strait, Haro Strait  
16 and the eastern end of the Strait of Juan de Fuca,  
17 Admiralty Inlet, and then arrives at the waters off  
18 Seattle."

19 The next reference. Here the Lummi recognize that  
20 Admiralty Inlet is not an inlet in the usual sense of the  
21 term. "It too is a strait and narrow body of water  
22 connecting two larger bodies of water." So the Lummi's  
23 definition of the Admiralty Inlet corresponds with the  
24 court. Nobody is off on la-la land with respect to the  
25 geography.

1       "Admiralty Inlet in the eastern portion of the Strait  
2 of Juan de Fuca, located between Admiralty Inlet and Haro  
3 Strait, are marine waters between Fraser and the south."

4       Reference Number 5. "The waters west of Whidbey  
5 Island comprise Admiralty Inlet. Those to the east are  
6 Saratoga Passage and Possession Sound. Admiralty Inlet  
7 opens into the Strait of Juan de Fuca." And that is  
8 important, because this "opens into" is defining the area  
9 as ending at that point.

10       "North of this strait lie the waters of the San Juan  
11 Archipelago, including both Haro and Rosario Straits."  
12 Again, we are talking about the exact body of water that  
13 is inside of Lummi's regulations.

14       And then References 5 and 6 just refer again to the  
15 Strait of Juan de Fuca and Admiralty Inlet.

16       Another thing, before I do the last reference that I  
17 want to point out, is that every time they refer to this  
18 question they refer this court to maps at Appendix C. If  
19 you go to maps at Appendix C, you find this map.

20       Now, today they are going to make ado about U.S.A. 62.  
21 U.S.A. 62 was found at Page 101 of 362 items in their  
22 appendix. It was not cited once by them in any of their  
23 briefs. These are the maps they were referring the court  
24 to. So if they try to convince this court that somehow  
25 the Ninth Circuit relied on U.S.A. 62, I think that falls

1 flat.

2       Here is the map they were looking at. They refer to  
3 this as an illustrative map. Here we have Admiralty  
4 Inlet. And then we get to the last reference -- You have  
5 to imagine that Judges Beezer and Hawkins are sitting  
6 there late at night looking at this map. Judge Beezer is  
7 from Seattle. He probably has some knowledge of the area.

8       And then we have the last reference on Page 14 of  
9 their reply brief. "If one starts at the mouth of the  
10 Fraser River and proceeds south, one passes Point Roberts,  
11 bisects Haro Strait west of the San Juan Islands, and  
12 crosses the eastern portion of the Strait of  
13 Juan de Fuca." Undoubtedly this is the exact path that  
14 they have granted themselves in their regulations, as if  
15 they won the entire Ninth Circuit case.

16       This is what they were asking for: "Following the  
17 marine waters from there one necessarily passes through  
18 Admiralty Inlet and across Hood Canal. See illustrative  
19 maps at Appendix C, Lummi opening brief and Dr. Lane's map  
20 at Page 88."

21       This is the only map that they are going to refer to.  
22 This is the reef net map. This is the reef net map that  
23 Dr. Lane testified about. This has the reef nets on the  
24 shores of the San Juan Islands. This is what was in front  
25 of the court when it issued its decision.

1       The one thing I would like the court to think about is  
2 the strange fact that the Ninth Circuit begins to adopt  
3 Lummi's phraseology on Page 14 of their reply brief. It  
4 starts with the same language. The language we are  
5 struggling with from the Ninth Circuit says, "If one  
6 starts at the Fraser River."

7       At that point it would have been easy for the law  
8 clerk to cut and paste, if that's what they wanted to do.  
9 If they wanted to adopt Lummi's path they would have  
10 continued and said, "and crosses the eastern portion of  
11 the Strait of Juan de Fuca."

12       Instead, the Ninth Circuit veers, and says, "Instead  
13 of going through, bisecting Haro," he says, "Travels past  
14 Orcas and the San Juans," which is in the middle. And he  
15 says, "Then we get to Admiralty Inlet."

16       Under an analysis that tries to find that the whole  
17 decision makes sense, I would say we are not going to get  
18 there. But if we want to know what the court considered  
19 and rejected, it would be the very path that Lummi is  
20 fishing in now, and the path that they asked for in the  
21 brief, and the path that was necessarily not granted.

22       Now, when Lummi sat down and drew their line from Haro  
23 to Admiralty Inlet, giving themselves that passageway, we  
24 believe they are violating the plain language of the  
25 decision, where it says, not once, not twice, but three

1 times, pretty clearly, the Strait of Juan de Fuca is not  
2 included. It doesn't say part of the Strait of  
3 Juan de Fuca. And the court was clearly aware that this  
4 was the eastern Strait of Juan de Fuca.

5 So what does the court -- what should the court do  
6 when they are looking at a judicial opinion? Well,  
7 interestingly enough -- or it is interesting to me, the  
8 court the same day issued another judicial opinion in  
9 **Muckleshoot versus Lummi**. In that decision the court --  
10 the same panel -- it is almost like they were telling a  
11 joke, says judicial decisions are not like statutes. We  
12 don't want you to look at them like that. This is at 235  
13 F.3d 429. "Opinions, unlike statutes, are not usually  
14 written with the knowledge or expectation each and every  
15 word may be the subject of searching analysis. This is  
16 why we look at the record that is in front of the court."

17 So, ironically, it was as if the judges knew that they  
18 had just written a decision that they didn't want to be  
19 viewed with searching analysis as to every term.

20 But, you know, I am hearing you, that you are  
21 concerned about this passageway. But Lummi's view is even  
22 more absurd. They say "the general" in the description  
23 and the ruling should govern over the specific reversal --  
24 the specific grounds of affirmance in the Strait of  
25 Juan de Fuca. That doesn't make sense or seem right.

1       In addition, there is only one area of law where the  
2 court has ever said: Okay, we understand this is a harsh  
3 result, and we are going to save you from the harsh  
4 impacts of the law. And that's where you have an implied  
5 easement.

6       I'm sure your Honor has dealt with implied easements.  
7 You have two parcels of property, and you are not paying  
8 attention, and you sell one of them, but you don't reserve  
9 yourself the right to cross and get out to the street.  
10 And there the court will say, we are going to save you  
11 from the harsh impacts of this, and we are going to apply  
12 an easement across the other property.

13       But here, the Lummi has done far more than imply  
14 themselves an easement. They don't want the right of  
15 passage, which is what they said repeatedly to the Ninth  
16 Circuit, we just want a passageway. This isn't about a  
17 passageway. They want the right to pick their neighbors'  
18 fruit and fish in their pond, and take all of the natural  
19 resources along the way. And that's where they go beyond  
20 what the court can do for them here.

21       The court can't do more than potentially imply a right  
22 of passage without the right to harvest. The court can't  
23 rewrite or expand or enlarge the judicial decision.

24       In closing, I would like to say what we have here, in  
25 response to our claim that they are fishing in the Strait

1 of Juan de Fuca, is several competing and contradictory  
2 explanations. Not one of their explanations in their  
3 brief tracks the line that they have drawn across the  
4 Strait of Juan de Fuca, or is supported by it. Not one of  
5 the explanations in their brief corresponds with the  
6 other. All of them require that the Ninth Circuit, and  
7 two judges in this district, had no idea about the  
8 boundaries of the waters that they were talking about.  
9 This strains credibility and sounds a lot like  
10 metaphysical doubt.

11 I would say if a party comes to this court with six  
12 explanations for their behavior, it reminds me of what  
13 happens when I hear a scream in the other room. I run in  
14 and I say, what happened? The older child says it could  
15 have been this, it could have been that, she fell, she  
16 bumped her head, she did this, she did that. Somewhere  
17 towards the middle of the third explanation you think, did  
18 you hit your sister? Because when someone doesn't have  
19 just one explanation for their behavior that they in fact  
20 relied on, it strains credibility and sounds like an  
21 attempt to muddy the waters.

22 What we have here is an unfortunately imperfect  
23 decision. But it wouldn't be right here to fill in the  
24 blanks and grant Lummi 311 square miles of water that were  
25 not granted by the plain language of the decision.

1       I am going to request that you grant our motion, but  
2 first Mr. Crable would like to go through the district  
3 court's orders and assure this court that there was  
4 nothing anywhere in the district court order that would  
5 support the Lummi's line or their claims that these areas  
6 were ambiguous, or the judges didn't understand what they  
7 were ruling, or your Honor's concern that there might be  
8 some sort of unnamed, yet undiscovered body of water that  
9 the Lummi can now cross because it has not yet been  
10 adjudicated.

11       I am hoping in Mr. Crable's recitation he will focus  
12 on the specific catchment area question, because he is  
13 going to go over all the times that we mentioned which  
14 areas we were suing them for.

15           THE COURT: Thank you, counsel. Mr. Crable.

16           MR. CRABLE: Thank you, your Honor. Good morning.

17       Before I begin my prepared argument, I would like to  
18 address what I understood to be your Honor's questions  
19 that you began with. You asked what area was at issue  
20 here, if I recall correctly. The area is the hatched --  
21 east of this line, north of Admiralty Inlet. It might be  
22 kind of hard to see. It is also on this map. It is the  
23 cross-hatched area. That is what is at issue.

24       Your Honor's other question about what we expected you  
25 to do, do we expect you to say what the Ninth Circuit

1 meant by "the strait"? I would say no. What we would  
2 like this court to do is say that when the court said  
3 "Admiralty Inlet," it meant Admiralty Inlet, which was  
4 clearly defined. It was explained by the court what that  
5 was. In the papers before the court, and in the record,  
6 it was very clear what that body of water was, and it did  
7 not include this cross-hatched area that we believe is the  
8 eastern Strait of Juan de Fuca.

9 Now, my first prepared argument is, what is the  
10 operative period here? That is, what should the court be  
11 looking at in making this decision?

12 There is a fundamental disagreement between the  
13 parties on this question. The Lummi argues we should be  
14 looking at the evidence before Judge Boldt, and his  
15 determinations. The requesting tribes' position is that  
16 we should be looking at the record and the decisions in  
17 89-2. And we believe this position is supported by this  
18 court's order on motions for reconsideration, dated  
19 July 14th, 2009, the last time this same dispute was  
20 before your Honor.

21 In *Muckleshoot v. Lummi*, found at 141 F.3d 1355, the  
22 Ninth Circuit held, "The reviewing court should construe a  
23 judgment so as to give effect to the intentions of the  
24 issuing court. If there is any ambiguity, it should look  
25 to the entire record before that court."

1       Here, the courts of 89-2 are the issuing courts whose  
2 decisions should be interpreted. The two-step process for  
3 determining Judge Boldt's intent as to Lummi U&A has  
4 already been performed. This dispute is now 23 years old,  
5 subproceeding 89-2 was actively litigated for eleven  
6 years.

7       In the Americana Fabrics case, found at 754 F.2d 1524,  
8 the Ninth Circuit held that collateral estoppel bars the  
9 re-litigation of issues of fact or law that were actively  
10 litigated and necessarily decided.

11       Contrary to what Lummi argues, the fact that the  
12 rulings of this court in 89-2 were appealed and partially  
13 reversed does not mean that the nine years of litigation  
14 before this court has no effect.

15       The question of Judge Boldt's intent, and the evidence  
16 before him as to Lummi's U&A was effectively litigated for  
17 eleven years and necessarily decided. Therefore, the  
18 records and decisions to be reviewed here are those of the  
19 courts of 89-2.

20       I was going to address the Board on Geographic Names  
21 definitions, but it is my understanding that you struck  
22 that. So I will move on.

23       Next, is, what was actively litigated and necessarily  
24 decided in 89-2? The request for determination in 89-2, a  
25 page of which I placed on the screen, asked the court to

1 determine whether Lummi had a treaty right to fish in the  
2 Strait of Juan de Fuca, Admiralty Inlet and the mouth of  
3 Hood Canal. Judge Coyle heard arguments in that case. He  
4 reviewed evidence. Both parties put on evidence. He held  
5 that the Lummi did not have the right to fish in any of  
6 those waters.

7 In Lummi's cross-request, filed about a year later, a  
8 page of which is now on the screen, Lummi asked the court  
9 to determine if they had a treaty right to fish in the  
10 Strait of Juan de Fuca, east from the Hoko River to the  
11 mouth of Puget Sound, the waters west of Whidbey Island,  
12 and Admiralty Inlet. And then there were some other  
13 waters that are no longer relevant to this dispute.

14 Judge Rothstein heard arguments from the parties,  
15 reviewed the evidence, and determined that the waters  
16 covered by Lummi's cross-request were the same as those  
17 covered by the RFD -- that is an important point, which we  
18 discuss in our briefing, and then held that the Lummi did  
19 not have a treaty right to fish in any of those waters.

20 The Lummi now argues that there is no identity of  
21 causes of action here, between this subproceeding and  
22 89-2, because -- they argue there is water at issue here  
23 that was not at issue in 89-2. This map is their  
24 depiction of what that water is. This claim is not  
25 supported by the evidence.

1       One of the actions of the Lummi that compelled the  
2 bringing of subproceeding 89-2 was the issuance of Lummi  
3 regulation 89-08. This is a page from the RFD that  
4 discusses it. It lays out how this is part of the reason  
5 why they are bringing the case.

6       This is the first page of that regulation, which as  
7 you can see, lays out quite a few fin fish catch-reporting  
8 areas -- or shellfish catch-reporting areas that they have  
9 opened for fishing.

10      With this regulation -- The Lummi has provided a map  
11 of all those catch areas, which I think makes it a lot  
12 easier to understand. This is Lummi's map. There is a  
13 little identifier down at the bottom. This is Lummi's map  
14 of all the areas opened by that regulation. In their  
15 motion for -- Except those circles, I added. Those were  
16 not on there.

17      In their TRO motion filed at the very start of the  
18 subproceeding, right after the subproceeding started, the  
19 requesting tribes noted that they were seeking to have  
20 Lummi barred from fishing areas in catch areas 23A through  
21 D, 25A through E, and 26A, all those which I have circled.  
22 That was the area of dispute. That clearly covers the  
23 area Lummi now claims was not at issue.

24      The description of the challenged areas was not a  
25 one-time thing. The requesting tribes used this same

1 description many times throughout the case, including in  
2 1990 and in 1994. It was relatively consistent.

3 There were times when the requesting tribes used both  
4 these shellfish catch-reporting areas, these 20s numbers,  
5 and the salmon catch-reporting areas, which are the  
6 numbers in the single digits. There were times when they  
7 used both, there were times when they only used one. But  
8 throughout the course of the litigation these were the  
9 areas in dispute.

10 So from the beginning, the requesting tribe's  
11 description of the waters at issue, using catch areas,  
12 clearly, without question, included the waters Lummi now  
13 claims is not at issue.

14 The courts of 89-2, generally, did not refer to catch  
15 areas in their determinations. In the Ninth Circuit, in  
16 particular, there is no evidence at all that they paid any  
17 mind to the catch areas at all.

18 So looking at the verbal descriptions of the areas at  
19 issue in 89-2, also clearly show that the areas at issue  
20 there included what Lummi now claims was not part of that  
21 subproceeding.

22 This on the screen now is from Lummi's memo in support  
23 of its 1993 cross-motion for summary judgment. It is  
24 Document Number 13828 in this case. The statement of the  
25 case could not be clearer. I view this as particularly

1 powerful evidence in support of our case, because, one, it  
2 shows that the court -- that in Lummi's view the primary  
3 purpose of this subproceeding was to bar Lummi from  
4 fishing in the eastern Strait of Juan de Fuca, which they  
5 defined in a way that clearly indicates we are talking  
6 about the waters they now claim weren't at issue.

7 Second, it also shows that Lummi knows -- And this  
8 goes somewhat to Ms. Rasmussen's argument. The court was  
9 told exactly where Admiralty Inlet is, and that Lummi did  
10 not consider it to expand west and north, clear up to Haro  
11 Strait.

12 Next on the screen, this is from a 1998 Lummi reply  
13 brief, Document 16497 in the case. Again, the Lummi's  
14 summary of what the subproceeding was about is  
15 instructive. This too shows the court that in the Lummi's  
16 view the primary question of the subproceeding was the  
17 Lummi fishing in the eastern Strait of Juan de Fuca,  
18 defined in such a way as to clearly include the waters  
19 that Lummi now claims is not at issue.

20 Second, it also shows that Lummi did not consider  
21 Admiralty Inlet to extend clear up to Haro Strait.

22 Also note the map that was attached with that brief.  
23 This was Lummi's map they submitted. It has these little  
24 flag identifiers, which I don't know, but I presume were  
25 placed by Lummi, that clearly indicates that Admiralty

1       Inlet is where Admiralty Inlet is.

2           Lastly, and I will try not to belabor these, because  
3        Ms. Rasmussen went over some of them, we have Lummi's  
4        statements from the Ninth Circuit brief, which shows -- I  
5        am going to talk about four statements that I believe show  
6        clearly that the dispute and the subject of Lummi's  
7        appeal, that the Lummi felt it was appealing from the  
8        district court's determination, were the waters from the  
9        San Juan Islands to the vicinity of Seattle. Next, the  
10       marine waters of Admiralty Inlet, and the open marine  
11       waters in the Strait of Juan de Fuca between Admiralty  
12       Inlet and the Haro Strait. Next, going from the Fraser  
13       River up to Seattle, one would pass through Georgia  
14       Strait, Haro Strait, the eastern end of the Strait of  
15       Juan de Fuca, Admiralty Inlet, and then arrives at the  
16       waters off of Seattle.

17           Note also here that the Lummi description of Admiralty  
18        Inlet is a narrow body of water connecting two larger  
19        bodies of water.

20           Lastly -- And Ms. Rasmussen touched on this. I also  
21        think this is a very important piece of evidence. "The  
22        waters" -- Lummi's statement to the Court of Appeals.  
23        This is in their opening brief. This is their appeal.  
24        "The waters to the west of Whidbey Island comprise  
25        Admiralty Inlet." There is some dispute about what the

1       waters west of Whidbey Island means, whether that means --  
2       when they say that, regarding Admiralty Inlet, that means  
3       the whole thing, up the entire coast of Whidbey.

4       Here, Lummi says, "The waters to the west of Whidbey  
5       Island comprise Admiralty Inlet." Admiralty Inlet opens  
6       into the Strait of Juan de Fuca. North of this strait --  
7       You can see here on the map. North of this strait is the  
8       San Juan Islands Archipelago, including both Haro and  
9       Rosario Straits.

10      Lummi's argument that there is a portion of water in  
11      the eastern Strait of Juan de Fuca at issue in this  
12      subproceeding that was not at issue in 89-2 is false.

13      To conclude, your Honor, the only way the court can  
14      rule, I believe, in Lummi's favor here, is if you conclude  
15      that the Ninth Circuit -- when the Ninth Circuit said  
16      "Admiralty Inlet," it meant Admiralty Inlet and the Strait  
17      of Juan de Fuca.

18      Such a finding would require the court to find that  
19      the Ninth Circuit badly misunderstood the geography, and,  
20      importantly, as I just went through, and Ms. Rasmussen  
21      went through as well, that the Ninth Circuit totally  
22      disregarded Lummi's own descriptions of the water at issue  
23      in the case, provided in their own briefing.

24      Lastly, and Ms. Rasmussen touched on this as well,  
25      after the case was over, this is what they said they did:

1 They concluded that the opinion included Haro Strait and  
2 Admiralty Inlet and the waters between the two. But  
3 that's not what the case said. The case said Admiralty  
4 Inlet. And that's it.

5 Lummi's post hoc rationalizations and explanations,  
6 that now, for the first time ever, Admiralty Inlet has  
7 grown four times its recognized size, should fail.

8 Thank you, your Honor.

9 THE COURT: Thank you, Mr. Crable.

10 MS. NEIL: Good morning, your Honor.

11 THE COURT: Ms. Neil.

12 MS. NEIL: Mr. Johnsen is going to assist me with  
13 some of these exhibits.

14 May it please the court, my name is Mary Neil. I  
15 represent the Lummi Nation. Present today in the  
16 courtroom are numerous representatives from the Lummi  
17 Nation that I would like to draw the court's attention to.

18 The United States Supreme Court has described the  
19 right to resort to usual and customary fishing places as  
20 part of the larger rights of the Indians, upon the  
21 exercise of which there was not a shadow of impediment,  
22 and which were not much less necessary to the existence of  
23 the Indians than the atmosphere they breathe.

24 This is as true today for the Lummi Nation as it was  
25 in 1904 when Justice McKenna wrote that statement. The

1 members of the Lummi Nation and their ancestors have  
2 fished the disputed waters since time immemorial, and for  
3 the last 38 years have done so under the authority of  
4 Judge Boldt's ruling.

5 This subproceeding marks the third attempt by the  
6 Klallams to alter and diminish that ruling.

7 Before turning to specific responses, I would like to  
8 discuss an overarching matter, and Mr. Crable spoke about  
9 the fundamental differences, the disagreement between --  
10 the nature of these proceedings. The Lummi Nation asserts  
11 that this court is bound to look at the language of Judge  
12 Boldt in Final Decision 1, at the language of the Ninth  
13 Circuit, and the evidence before Judge Boldt, because that  
14 is what the Ninth Circuit looked at.

15 The Klallams assert that you should ignore this,  
16 ignore the language of the court, ignore the evidence  
17 before Boldt, and look only to the statements of the  
18 parties and extraneous definitions.

19 They encourage this court to engage in analysis that  
20 is analogous to the game of telephone. As the court  
21 undoubtedly knows, this schoolhouse game is a metaphor for  
22 the distortion process of acquiring first, second and  
23 third-hand information. The more filtered the  
24 information, the more corrupt the message becomes, and  
25 increased are the opportunities for the message to be

1 shaped by those passing it on. The information inevitably  
2 becomes distorted.

3 The Klallam seek to distort Final Decision 1 with  
4 manipulated maps, extraneous definitions and statements  
5 made by the parties. This sort of review is contrary to  
6 the concepts of finalities of judgments, and results in  
7 the diminishment of the reserved treaty rights.

8 The Ninth Circuit explained the court's continuing  
9 jurisdiction under Paragraph 25 does not allow the court  
10 to clarify the meaning of terms used in the decrees, or to  
11 resolve ambiguities with supplemental findings which  
12 alter, amend, or enlarge upon the descriptions in the  
13 decrees.

14 The Klallams attempt to distort Judge Boldt's language  
15 in Final Decision 1 from the marine waters of northern  
16 Puget Sound, from the Fraser River south to the present  
17 environs of Seattle, to something more like the marine  
18 waters of northern Puget Sound, from the Fraser River to  
19 the southern shorelines of the San Juan Islands, and east  
20 to the environs of Seattle.

21 Judge Boldt knew full well how to craft descriptions  
22 with directional and land mass cues. For example, a  
23 portion of the Makah's U&A is described as the waters of  
24 the Strait of Juan de Fuca to Port Crescent near  
25 Port Angeles, extending out into the ocean to an area

1 known as Swiftsure, and then south along the Pacific Coast  
2 to an area intermediate to Ozette Village. There is more  
3 to it. For the purposes of today I will stop there.

4 Judge Boldt could have mirrored this language. He  
5 could have said the marine waters of northern Puget Sound  
6 from the Fraser River, south to the San Juan Islands and  
7 east to the environs of Seattle. That is not what Judge  
8 Boldt wrote. That is not what Judge Boldt intended. And  
9 this court is prohibited from altering or diminishing  
10 Judge Boldt's determination.

11 The Nation implores this court to adhere to the proper  
12 process and reject the Klallams' attempt to distort Judge  
13 Boldt's final judgment.

14 The Klallams' motion should be denied for three  
15 reasons: They cannot meet their burden of presenting  
16 evidence that disputed waters are not within Lummi's U&A.  
17 More plainly stated, all of the evidence, and the Ninth  
18 Circuit's interpretation, support the conclusion that the  
19 disputed waters are within Lummi's U&A.

20 Two, the Klallams have not and cannot produce any  
21 evidence the disputed waters are excluded from Lummi's  
22 U&A.

23 Finally, Lummi has not adjudicated its right to the  
24 Strait of Juan de Fuca. What was litigated in 89-2 was  
25 whether Judge Boldt intended to include the Strait of

1 Juan de Fuca within Lummi's U&A. As such, res judicata  
2 would not bar Lummi if it chose at a later date to seek to  
3 expand U&A to the Strait of Juan de Fuca.

4 Now, let's turn to Final Decision 1. Judge Boldt  
5 intended to give broad general descriptions of some of the  
6 areas the tribes fished at treaty times. Here, he said,  
7 and I quote, "Although no complete inventories of all the  
8 tribes' usual and accustomed fishing sites can be compiled  
9 today, the areas identified in Finding of Fact 3 herein  
10 for each of the plaintiffs tribes, in general, describes  
11 some of the fresh water systems and marine areas within  
12 which the respected tribes fished at the time of the  
13 treaties, and wherein those tribes, as determined above,  
14 are entitled to exercise their treaty rights today."

15 Judge Boldt intentionally wrote broad descriptions  
16 because he recognized that it would be impossible to  
17 compile a complete inventory of any tribe's usual and  
18 accustomed fishing grounds. He concluded, "Designation of  
19 fresh water systems in marine areas as the only method to  
20 provide a fair and comprehensive account of the usual and  
21 accustomed fishing places."

22 So, first, in interpreting Judge Boldt, or any judge,  
23 the determination must be construed to give effect to the  
24 intent of the issuing court. Judge Boldt said what he  
25 intended to do, and he did just that. He issued broad

1 general descriptions.

2 Specifically for Lummi he provided the following broad  
3 description: "The single most valuable resource" --  
4 "valuable fish resource for the Lummis was undoubtedly the  
5 Sockeye, which the Lummi were able to intercept in the  
6 straits on the annual migration of the Sockeye from the  
7 ocean to the Fraser River. The Lummis had reef net sites  
8 on Orcas Island, San Juan Island, Lummi Island and Fidalgo  
9 Island, and near Point Roberts and Sandy Point. These  
10 Indians also took salmon and steelhead near the mouth of  
11 the Nooksack River, and steelhead in Whatcom Creek. They  
12 trolled the waters of the San Juan Island for various  
13 species of salmon. In addition to the reef net locations  
14 listed above, the usual and accustomed fishing places of  
15 the Lummi Indians at treaty time included the marine areas  
16 of northern Puget Sound, from the Fraser River south to  
17 the present environs of Seattle, and particularly  
18 Bellingham Bay. Fresh water fisheries included the river  
19 drainage systems emptying into the bays, from Boundary Bay  
20 south to Fidalgo Bay."

21 Secondly, we have Judge Boldt describing the Lummi's  
22 U&A, adhered to the method he announced. He identified  
23 specific areas -- He didn't include them all. For  
24 example, Barbara Lane's testimony included places such as  
25 Cherry Point. Then he added, in addition to the specific

1 sites, the marine areas of what he termed northern Puget  
2 Sound, from the Fraser River south to the present environs  
3 of Seattle.

4 Judge Boldt cited to a portion of the record to  
5 support that broad general description. One of those is  
6 U.S.A. 62. What we have over here on the podium is a copy  
7 of U.S.A. 62. The original is in the courtroom. However,  
8 it is not -- it is rolled up, so we are going to use that  
9 one. What Mr. Johnsen has identified is the blue, which  
10 would be the Strait of Juan de Fuca, the approximate areas  
11 labeled on the map.

12 The green overlay shows the U&A described, up until  
13 the point where Judge Boldt says, "In addition." So after  
14 that he adds the Fraser River up in the north, Orcas  
15 Island, San Juan Island and all of those there.

16 May I approach the exhibit?

17 THE COURT: You may.

18 MS. NEIL: So the Fraser River is right here, the  
19 mouth coming down. Orcas Island, San Juan Island. Here  
20 is the Lummi Reservation. The Nooksack River and Whatcom  
21 Creek is here. This is Fidalgo, Lopez. After he has  
22 identified those areas and the reef net sites there, he  
23 then said, "In addition, you get the marine areas from the  
24 Fraser River south to the environs of Seattle." The  
25 environs of Seattle is not listed on this map, is not

1 identified, but it would be down here a little bit past  
2 Mukilteo. So that would be the area there.

3 THE COURT: Judge Boldt never used the term  
4 "Strait of Juan de Fuca," did he, for this specific area?

5 MS. NEIL: He did not use that term for that  
6 specific area. I did not locate a definition in Final  
7 Decision 1. He didn't use it in Lummi's U&A. He did talk  
8 about it in Makah.

9 He also didn't define Puget Sound or northern Puget  
10 Sound, and used it differently, as this court has already  
11 noted. So he gave us the definition of northern Puget  
12 Sound.

13 So 24 years later Judge Rothstein interpreted Judge  
14 Boldt's finding and concluded that he did not include --  
15 intend to include the Strait of Juan de Fuca, Admiralty  
16 Inlet and the mouth of Hood Canal.

17 The Ninth Circuit reversed Judge Rothstein as to  
18 Admiralty Inlet, reasoning that Judge Boldt's  
19 intentionally broad finding naturally included in its  
20 sweep the waters between Haro Strait and the environs of  
21 Seattle. They reasoned that ascertaining Judge Boldt's  
22 intent as to Admiralty Inlet was more difficult because it  
23 was not used in Final Decision 1. Since there were no  
24 linguistic clues, as there were for the "Strait" or for  
25 "mouth of the Hood Canal," they concluded that it was just

1 as likely that Judge Boldt included -- intended to include  
2 it as not include it.

3 So to tip the scales the court turned to geography.  
4 They said, and I quote, "Geographically, however,  
5 Admiralty Inlet was intended to be included within the  
6 marine areas of northern Puget Sound from the Fraser River  
7 south to the present environs of Seattle. Admiralty Inlet  
8 consists of the water to the west of Whidbey Island,  
9 separating that island from the Olympic Peninsula.

10 Admiralty Inlet would likely be a passage through which  
11 the Lummi would have traveled through the San Juan  
12 Islands in the north to the present environs of Seattle.  
13 If one starts at the mouth of Fraser River and travels  
14 past Orcas and San Juan islands, it is natural to proceed  
15 through Admiralty Inlet to reach the environs of Seattle."

16 The Ninth Circuit gave us definitions and a reasoning  
17 to figure out how to apply that. Admiralty Inlet is the  
18 waters west of Whidbey Island that separate that island  
19 from the Olympic Peninsula. That definition fits with  
20 their logic and their description, from here to there.

21 The definition asserted by the Klallams locates the  
22 Strait of Juan de Fuca -- I'm sorry.

23 They also said, "It is clear Judge Boldt viewed Puget  
24 Sound and the Strait of Juan de Fuca as two separate  
25 regions, with the strait lying to the west of the Sound."

1       In his definition, "Northern Puget Sound, from here to  
2       there," the Strait of Juan de Fuca would be to the west.  
3       That fits with that definition.

4       The definition asserted by the Klallams interrupts  
5       northern Puget Sound, instead of winding to the west of  
6       it.

7       As I said, there is no reason to look to other  
8       definitions. Judge Boldt defined northern Puget Sound as  
9       including Fraser River, Haro and Rosario straits and the  
10       waters around the San Juan Islands.

11       The disputed water is between Haro Strait and the  
12       environs of Seattle.

13       The Ninth Circuit defined Admiralty Inlet for us. It  
14       said it is the body of water west of Whidbey Island that  
15       separates that island from the Olympic Peninsula. And  
16       they said it was in northern Puget Sound.

17       They could have been more limiting. They could have  
18       said the southern portion of Whidbey Island, but they  
19       didn't. They said the water west of Whidbey Island,  
20       separating that island from the Olympic Peninsula.

21       It is entirely possible that the Ninth Circuit adopted  
22       the Klallams' own definition from their request for  
23       determination, which said, "Admiralty Inlet," comma,  
24       "which is the body of water west of Whidbey Island."

25       The Ninth Circuit also concluded, "The Strait of

1 Juan de Fuca lies to the west, not as interrupting." So  
2 from the plain language of Judge Boldt and the Ninth  
3 Circuit, "The disputed waters are within northern Puget  
4 Sound, in between Haro Strait and the environs of  
5 Seattle."

6 Instead of focusing on the language of the Court, the  
7 Klallams would like you to focus on statements of the  
8 parties, and inadmissible, irrelevant, manipulated maps.

9 The Klallams have placed significant support on  
10 statements made by the parties, specifically Lummi. Their  
11 reliance is misplaced. For example, the Klallams seek  
12 support from their request for determination in 89-2. As  
13 I have already described to you, it described Admiralty  
14 Inlet as a body of water west of Whidbey Island.

15 Once they did that, they then requested relief only as  
16 to three areas, the Strait of Juan de Fuca, Admiralty  
17 Inlet, and the mouth of Hood Canal.

18 Perhaps this is because the Klallams' own expert in  
19 89-2 admitted that Lummi fished in the eastern Strait of  
20 Juan de Fuca as far south as Smith Island.

21 They also rely upon the listing of catch recording  
22 areas lumped together in a manner that makes it impossible  
23 to assign a catch-reporting area to either the Strait of  
24 Juan de Fuca, Admiralty Inlet or the mouth of the Hood  
25 Canal.

1       They continue to look for support and statements in  
2       the record that are described as convenient descriptions.  
3       The parties repeatedly acknowledged throughout 89-2 that  
4       the names of the areas varied, and often Puget Sound  
5       included the Strait of Juan de Fuca.

6       Other language the Klallam point to mirrors the  
7       language of the Ninth Circuit. Specifically -- May I  
8       approach the exhibit again? Specifically, they point to  
9       language in which we said if you start at the mouth of the  
10      Fraser River and you go south to about above -- I believe  
11      this is Dungeness Bay, and then proceed through the  
12      environs of Seattle through Admiralty Inlet, that somehow  
13      supports them.

14       It would be correct that we pass through the eastern  
15      strait under the line that we have drawn, down this way,  
16      this way. That's what the briefing said. It didn't say  
17      come down this way, hug the shorelines, and then follow  
18      down. We said south to here, follow the shoreline of the  
19      Olympic Peninsula in through Admiralty Inlet.

20       The Klallams also ignore many of their own statements.  
21      For example, in Docket 13986 the Klallams admit that the  
22      Lummis fished -- the Klallams admitted the Lummis fishing  
23      off the coast of Whidbey Island in the easternmost  
24      portions of the Strait of Juan de Fuca are not raised in  
25      89-2. They admitted at 6A and area -- I'm sorry, areas 6A

1 and 7. Those are the -- I get these mixed up. Let me  
2 double-check. Commercial salmon management and  
3 catch-reporting areas 6A and 7. They admit that those  
4 waters were not an issue in 89-2. And now throughout  
5 their briefing they have made those admissions in their  
6 motion for summary judgment and brief in support of that.

7 And then in their reply they say all of the waters at  
8 issue -- all of the water was excluded. So either it  
9 wasn't at issue -- is at issue now or is not at issue.

10 Numerous other examples are identified in Exhibit 27  
11 to my declaration. And also in Exhibit 20, which is the  
12 transcript of the hearing on the TRO that the Klallams  
13 referenced earlier.

14 So, your Honor, if you need to look at any map, I  
15 recommend that you look at the maps that were cited to by  
16 Judge Boldt. Those are U.S.A. 60 through 64. U.S.A. 62  
17 was identified by the Klallams in subproceeding 89-2 as  
18 clearly marking the location of the Strait of  
19 Juan de Fuca.

20 In conclusion, your Honor, the Klallams have failed to  
21 meet their burden. They attempt to distract this court by  
22 arguing that the Lummi traveled through this area. It is  
23 not enough to establish U&A.

24 They are 38 years too late to challenge the  
25 sufficiency of the evidence. Judge Boldt found sufficient

1 evidence to support his determination, and cited that  
2 evidence.

3 The inquiry here is not one that increases distortion,  
4 but should be a review of the evidence before Judge Boldt  
5 and the Ninth Circuit and the language of those two  
6 courts.

7 The Klallams' reliance on inadmissible -- their  
8 reliance on their manipulated maps and the parties'  
9 statements in subproceeding 89-2 is misplaced, and are not  
10 relevant. If they are, the Klallams made just as many  
11 statements, many of which are contradictory to their  
12 position today. The disputed water is within northern  
13 Puget Sound, and within Lummi's U&A. Klallams' motion  
14 should be denied.

15 THE COURT: Ms. Neil, thank you very much. I'm  
16 not sure if your legal arguments will win out in the end  
17 or not, but you get extra credit from me for not using all  
18 of your allotted time.

19 Ms. Rasmussen, I need a specific answer to one of the  
20 questions raised by Ms. Neil. This is the declaration of  
21 Sarah Burlingame. I am simply looking at the maps that  
22 are attached to that, Exhibit D, this one.

23 MS. RASMUSSEN: May I approach?

24 THE COURT: The reason I marked that, and the  
25 reason I need an answer, is Ms. Neil just raised it, the

1 areas designated as 6A and 6B are not part of the  
2 cross-hatched area that you indicate in your map. Are  
3 they in dispute or not in dispute? Are they at issue  
4 here?

5 MS. RASMUSSEN: Area 6A was the subject of a  
6 stipulation by Lummi, that it was not going to claim area  
7 6A in this subproceeding, even though the plain language  
8 of the description -- You don't stipulate unless you need  
9 to. The plain language of the description plainly  
10 included 6A. So they stipulated it out of the case. We  
11 did not sue them for 6A, because they were not opening 6A.  
12 Since you have to file actions that are not in conformity  
13 with Final Decision No. 1, it represented our recognition  
14 that they weren't exactly opening that.

15 In addition, with respect to Area 7, a footnote on  
16 Page 29 in our brief, after twelve years of litigation we  
17 failed to include the shellfish catch areas, which were  
18 part of the dispute, and which everybody knew. It is  
19 clear that -- The Lummi now pounce on that as some sort  
20 of great admission. But at the time in their reply brief,  
21 they didn't even notice it, because it was a mistake, and  
22 it was based on twelve years of litigation and everybody  
23 knowing what they are talking about.

24 I think that is something the court has to recognize  
25 here, that due to the length of the subproceeding the

1 parties did tend to get somewhat imprecise in their  
2 descriptions of the area. For example, her explanation  
3 that once we said Admiralty Inlet was the waters west of  
4 Whidbey Island. You know, it is. We didn't say it is  
5 only the waters north. We didn't use the terminology that  
6 the Ninth Circuit did. But it is the waters west of  
7 Whidbey Island. It just stops at the Point Wilson line.  
8 I don't think that can be used as an admission, especially  
9 not one that the Ninth Circuit relied on, to say that we  
10 thought Admiralty Inlet somehow went all the way north.

11 There is one fundamental difference that appears in  
12 this case, which is, the Lummi is here arguing that  
13 northern Puget Sound includes the Strait of Juan de Fuca,  
14 this portion of it. That ship has sailed. We are in  
15 totally uncharted waters here. We are talking about an  
16 ambiguity within a decision that was issued to resolve the  
17 ambiguity. We are talking about that one paragraph in the  
18 Ninth Circuit decision.

19 As good as those arguments were the first time around,  
20 it neglects the history of the case, which is Judge Coyle  
21 ruled on northern Puget Sound as not including these  
22 waters.

23 Trent Crable went over all of the catch-reporting  
24 areas that were at issue. They argued that path -- much  
25 like Suquamish did in subproceeding 05-3, that path

1 necessarily includes everything. We said no. Wait a  
2 minute. If you don't have evidence, it doesn't.

3 It also neglects that there are other paths to get up  
4 to the San Juan Islands. When I was a child we used to  
5 take the inside passage, because it was safer, and my  
6 mother hated to be seasick. It is neglecting that there  
7 are other realities at play here.

8 So when they reargue that the term "straits" includes  
9 the Strait of Juan de Fuca, that argument is in their  
10 lower court briefs and was rejected.

11 When they argued that this body of water between  
12 Admiralty Inlet and Haro Strait is part of northern Puget  
13 Sound, that argument was necessarily rejected when the  
14 court said this is two separate regions, with a strait  
15 lying to the west of the Sound.

16 But I would like to talk about something that hits  
17 home. Lummi's own expert, when they filed their  
18 cross-request for determination, said the territory of the  
19 Lummi includes a few miles of mainland shoreline and about  
20 half of the San Juan Islands. The islands it included  
21 included the northeastern shores of San Juan Island. This  
22 was their map.

23 This was the evidence that Lummi keeps on ignoring,  
24 that they did their cross-request for determination in  
25 1990, and affirmatively reclaimed these waters. So they

1 recognized that Judge Coyle said Judge Boldt did not  
2 intend these waters to be included. So they use  
3 Paragraph 25, I think it is subsection 6, to declare  
4 waters that were not specifically determined.

5 And they brought in their expert, Wayne Suttles, and  
6 he described the area as the eastern Strait of  
7 Juan de Fuca, that they were claiming, that partially  
8 enclosed water of the northern San Juan Islands and the  
9 Olympic Peninsula. And then their own expert was told by  
10 Judge Rothstein, you have not been specific as to the  
11 geographical areas that you are claiming. You need to go  
12 back. And the Lummi never did that. And now they stand  
13 here today and say, oh, the geographical areas are  
14 unclear.

15 There is a principle at play here. When you set up  
16 the very error that you are going to claim on appeal, you  
17 are not allowed to make hay of it.

18 If the Ninth Circuit misunderstood that Admiralty  
19 Inlet did not connect up to the San Juan Islands, then it  
20 was Lummi that misled them. The only party that ever once  
21 said that Admiralty Inlet could get you all the way to the  
22 San Juan Islands was in their Ninth Circuit brief on  
23 Page 16. They said Admiralty Inlet is a passageway to the  
24 San Juan Islands. And they forgot, like everybody else is  
25 doing sometimes, to be exact. But nine other times they

1       were very exact. To claim the Ninth Circuit somehow got  
2       it wrong is misleading.

3           But the operative period is at the Ninth Circuit.  
4           That is the decision we are struggling with. Everybody  
5       understood what Judge Coyle and Rothstein had ordered.  
6           Even Lummi said, we don't have to worry about the western  
7       boundary because the whole strait was excluded. There is  
8       no ambiguity there. The ambiguity is in the Ninth Circuit  
9       decision, which contradicts itself, and doesn't create a  
10       pathway.

11           Now, had Lummi availed themselves to the motion for  
12       clarification, a process that they are very able to use  
13       today -- Every time your Honor issues a decision, it  
14       seems like if there is the slightest thing wrong about it,  
15       we make sure you know about it right away.

16           There is a standard: Manifest error. I don't know  
17       what the standard was in 2000 when they issued their  
18       decision, but it seems to me they would have had to make a  
19       showing saying, hey, this doesn't make sense, there is no  
20       connectivity, are you really denying us all of the Strait  
21       of Juan de Fuca, or do you mean to give us 310 square  
22       miles back? And then the Ninth Circuit could have ruled.  
23       The judges would have still been there. And Judge Beezer  
24       could have said, hey, you know what, maybe I didn't  
25       understand what was at issue here. But the point to know

1 that is now over.

2 This is the map that they asked the court to look at.

3 When I first saw this map, I thought, well, the Ninth  
4 Circuit just misunderstood these county lines. And maybe  
5 they thought that that county line was the boundary of  
6 Admiralty Inlet. As long as we are guessing, if we are  
7 going out on a limb, we might as well go out all the way,  
8 right? As long as I am guessing what Judge Beezer  
9 thought, maybe that is what he thought.

10 For this reason, when Lummi tried to use this map at  
11 the Ninth Circuit in our appeal of your previous decision,  
12 we said that map is misleading, because that isn't the  
13 boundary of the Admiralty Inlet. It is a mistake. We  
14 moved to strike. The Court agreed and struck the map.

15 If the Court had been mislead, or was confused about  
16 this line, it clarified that fact and said Admiralty Inlet  
17 consists of the waters separating that island from the  
18 Olympic Peninsula. That was my only potential way to make  
19 this decision make sense.

20 I think what we are left with is a decision that  
21 doesn't entirely fit together like the perfect puzzle  
22 piece that we had. And we have the same panel telling us,  
23 at the same time, please don't look at our decisions as if  
24 they were these perfect works of statutes, where each and  
25 every word was debated and analyzed. That's not what you

1 do. You look at what -- The question the Lummi asked  
2 this court, the Ninth Circuit, the one that issued the  
3 decision at play here was for the right to cross from Haro  
4 to Admiralty Inlet, and to cross the eastern Strait of  
5 Juan de Fuca. And the answer was no.

6 We ask this court to enforce that portion of the  
7 decision.

8 THE COURT: Thank you very much, Ms. Rasmussen.

9 MR. CRABLE: Do we have any remaining time, your  
10 Honor? A couple of quick points.

11 THE COURT: No, Mr. Crable. Thank you.

12 Mr. Crable, thank you very much for your argument as well,  
13 and Ms. Neil.

14 Ms. Rasmussen, you said something at the very  
15 beginning that kind of resonated with me a little bit,  
16 talking about Judge Beezer sitting with the other members  
17 of the panel, I believe it was Judge Schroeder and Judge  
18 Hawkins, late at night. Judge Beezer was much more of a  
19 morning guy, so it was probably breakfast. But Hawkins,  
20 Schroeder, not from here. Judge Beezer was a native, and  
21 if I remember correctly, an avid boater as well, who loved  
22 to be around the San Juan Islands.

23 Thank you all. I will go back and look at it very  
24 carefully. As usual, I will try to get a decision to you  
25 as quickly as we can. We will be at recess.

1 (Adjourned.)

2 **CERTIFICATE**

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10 I, Barry L. Fanning, Official Court Reporter, do  
11 hereby certify that the foregoing transcript is true and  
12 correct.

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14 S/Barry L. Fanning

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Barry L. Fanning